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No. 88-618

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

GRANITE ROCK COMPANY, a corporation,
Petitioner,

v.

BUILDING MATERIALS AND CONSTRUCTION
TEAMSTERS LOCAL 216,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Associated General Contractors of America, Inc. (hereinafter "AGC"), respectfully moves this Court, pursuant to Supreme Court Rule 36, for leave to file the enclosed brief *amicus curiae* in support of the petition for a writ of certiorari in this proceeding. In support of this motion, AGC states as follows:

1. Pursuant to Supreme Court Rule 36, AGC requested the consent of the parties to file the enclosed brief *amicus curiae*, and received the consent of the Petitioner but not of the Respondent. Although motions for leave to file briefs *amicus curiae* in support of petitions for writs of certiorari, without consent of all parties, is not favored under the Court's rules, AGC's extensive involvement in collective bargaining with the building trades unions makes AGC uniquely situated to provide assistance to this Court on the issues raised by this proceeding.

2. Founded in 1918, AGC is a private, non-profit trade association that regularly represents the interests of construction contractors throughout the United States. AGC counts approximately 8,000 of the nation's leading general construction contractors among its approximately 32,500 members. These contractors are engaged in all forms of commercial construction, from highways and bridges, to commercial buildings, to industrial facilities. Annually, AGC members perform approximately 80% of the total volume of all contract construction in the United States.

3. AGC represents the vital interests of its members in selected cases before the courts, the United States Congress and the executive and independent regulatory agencies of the federal government. This includes assistance to courts in their deliberations on significant labor-management relations and related matters. As an *amicus curiae*, AGC participated in *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1982), and *DeBartolo v. NLRB*, 463 U.S. 147 (1983).

4. AGC has 104 local chapters, with at least one chapter in each of the fifty states and one chap-

ter in Puerto Rico. These chapters represent the interests of AGC members at the state and local level. Petitioner Granite Rock Co. is an Associate Member of the AGC of California and a National Associate Member of AGC of America.

5. The vast majority of AGC chapters provide collective bargaining services to AGC members. Some actually negotiate collective bargaining agreements as the agent of the construction contractors in their respective areas. Other chapters may coordinate collective bargaining, but not get directly involved. Still others simply provide informational or administrative services.

6. Although AGC's current membership includes many open shop contractors, AGC is strongly committed to the collective bargaining process. Consistent with this position, numerous AGC contractors have entered into collective bargaining agreements, the vast majority of which contain a standard arbitration provision.* AGC contractors have entered into such agreements in reliance on the federal labor policy, as previously enunciated by this Court, that only those disputes that the parties have contractually agreed to arbitrate are subject to arbitration.

7. AGC has a vital interest in review of the Ninth Circuit's decision, because that decision, if left undisturbed, would detrimentally affect many AGC chapters that negotiate multiemployer agreements with the building trades unions on behalf of AGC members. It would also adversely affect AGC members that negotiate with the building trades unions on an individual basis. Although

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* A recent survey conducted by the Construction Labor Research Council shows that 1,253 of the 1,445 construction labor agreements in its database contain arbitration provisions.

the decision below is inconsistent with the applicable decisions of this Court and the decisions of other circuits, it has nevertheless created great concern that the building trades unions will be in a position to compel arbitration of labor disputes without regard to the parties' intent simply by alleging the violation of an "implied covenant." This concern could discourage agreements to arbitrate disputes and adversely impact collective bargaining in the industry as a whole.

For the foregoing reasons, AGC respectfully requests that (1) this motion for leave to file brief *amicus curiae* in support of the Petition for a writ of certiorari be granted; and (2) that the enclosed brief *amicus curiae* be accepted for filing.

Respectfully submitted,

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QUESTION PRESENTED

Whether a standard arbitration clause in a collective bargaining agreement, limited to disputes that arise under the agreement, compels the arbitration of every act or omission that is alleged to violate an "implied covenant" of the agreement, without regard to the intent of the parties at the time that they entered into the agreement.

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BRIEF AMICUS CURIAE OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF PETITIONER

The Associated General Contractors of America, Inc., respectfully submits this brief in support of the petition for a writ of certiorari filed in No. 88-618 to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 11, 1988.*

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* Amicus accepts the Petitioner's statement of the case.

INTEREST OF AMICUS

The foregoing motion for leave to file as an *amicus curiae* fully states AGC's interest in the question presented.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision on the role of the judiciary in cases brought to compel labor arbitration conflicts with the decisions of this Court in *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), and *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643 (1986). In addition, the Ninth Circuit's failure to engage in a preliminary analysis of the union's grievance, to determine whether it "arises under" the substantive terms of the collective bargaining agreement, is impossible to reconcile with the decisions of the Third and the Eleventh Circuits. If left undisturbed, the decision of the lower court will require arbitration whenever a collective bargaining agreement contains a standard arbitration clause and one of the parties claims a violation of an "implied covenant." Either party can compel the arbitration of any issue, including issues that the parties never intended to arbitrate.

The result is great uncertainty in the administration of current labor agreements and unnecessary difficulty in the negotiation of new ones. Over time, the lower court's decision will threaten the stability of labor-management relations, as both unions and employers seek alternative methods of dispute resolution and arbitration loses its current importance in the maintenance of industrial peace. A decision with such detrimental consequences for our federal labor policy should not be permitted to stand.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision Conflicts with the Applicable Decisions of this Court and the Decisions of Other Circuits.

The Ninth Circuit's decision conflicts with the body of law that has grown out of this Court's decisions in *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (hereinafter the "*Steelworkers Trilogy*"), including this Court's later decision in *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643 (1986) (hereinafter "*AT&T*").

The Ninth Circuit's refusal to go beyond the wording of the union's grievance, to question whether the grievance did, in fact, arise under the terms of the collective bargaining agreement, also conflicts with decisions that have emerged from other circuits. Contrary to the Ninth Circuit, the Third Circuit, in *Morristown Daily Records v. Graphic Communications Union, Local 8N*, 832 F.2d 31 (3d Cir. 1987), and the Eleventh Circuit, in *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 327 F.2d 709 (11th Cir. 1987), have correctly recognized that the courts are to decide whether any one grievance falls within the scope of a labor arbitration clause.

In the *Steelworkers Trilogy*, this Court developed the framework for the modern law of labor arbitration. This Court had already acknowledged the importance of arbitration, as a mechanism for promoting the government's interest in industrial peace, while honoring the preference of both labor and management for the private resolution of their disputes. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). This Court proceeded, in the *Steelworkers Trilogy*, to advance arbitration as an effective alternative to industrial strife. The

Steelworkers Trilogy established a strong presumption of arbitrability, going so far as to require labor and management to utilize contractually created arbitration procedures "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582-583. This Court did not, however, permit the policies that favor labor arbitration to obscure the contractual nature of the parties' obligations. To the contrary, the *Steelworkers Trilogy* emphasized that arbitration is exclusively a matter of contract, and that whether the parties have agreed to arbitrate a particular dispute remains a question for the courts, and not the arbitrators, to decide. This Court later explained, in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-547 (1964):

> Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court on the basis of the contract entered by the parties. . . . [T]he duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.

To be sure, this Court has cautioned that in deciding whether disputes are subject to arbitration, the lower courts are to avoid any unnecessary intrusion into the merits of the dispute. This Court has, in effect, required the lower courts to weigh the contractual basis for labor arbitration against the presumption of arbitrability. The Ninth Circuit's decision nevertheless merits review, and indeed, reversal. The lower court did not simply fail to strike the appropriate balance; the court made no effort to balance the competing considerations.

The Ninth Circuit completely severed the question of arbitrability from the parties' intent, and relied entirely

on the presumption of arbitrability. If the decision of the lower court is correct, then the presumption has become an irrebuttable rule of law that requires the arbitration of all acts or omissions that breach allegedly "implied covenants" of collective bargaining agreements that include standard arbitration clauses.

In *AT&T*, the Seventh Circuit had yielded to a similar —though less extreme—emphasis on the presumption of arbitrability. In order to avoid any intrusion into the merits of the parties' dispute, the Seventh Circuit proposed to require arbitration of the scope of the arbitration clause whenever the collective bargaining agreement contains a standard arbitration clause, the parties have not clearly excluded the dispute from arbitration, and a court decision on the arbitrability of the dispute would entangle the court in the substantive provisions of the agreement.

Expressing its clear disagreement with the Seventh Circuit's approach, this Court declared it "evident" that the Seventh Circuit had "erred," because the judiciary must decide whether labor and management are contractually bound to submit a dispute to arbitration, even if that risks substantive involvement. Emphasizing the lower courts' duty to determine whether the parties to a collective bargaining agreement intended to arbitrate a dispute, this Court also cautioned that both labor and management would be far less willing to enter into agreements requiring arbitration if labor arbitrators had the power to determine their own jurisdiction. Commenting on the potentially adverse consequences of the Seventh Circuit's approach, this Court stated:

> Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but instead, would be empowered to impose obligations outside the contract limited only by his understanding and conscience. [*AT&T*, 475 U.S. at 651,

quoting Cox, *Reflections upon Labor Arbitration*, 72 Harv. L. Rev. 1436, 1509 (1509).][1]

The facts of the instant case are even more compelling than the facts of *AT&T*. In the instant case, the union alleged that Granite Rock had violated an "implied covenant" in the parties' collective bargaining agreement. The union has conceded, however, that the alleged covenant has no nexus with the express provisions of the agreement, the parties' bargaining history, the parties' past practice, or any other factual circumstance. The Ninth Circuit held that the district court had correctly compelled arbitration simply because the grievance appeared, on its face, to involve an interpretation of the collective bargaining agreement.

In fact, the grievance presupposed a duty that the federal common law of collective bargaining agreements has never implied into these agreements. Elevating the form of the union's grievance over its substance, the Ninth Circuit wrongfully deprived Granite Rock Co. of its right to an independent judicial determination of the scope of the arbitration clause, and authorized the arbitrator, in effect, to create new federal common law.

It is submitted that the Ninth Circuit's decision also conflicts with the Third and Eleventh Circuits' interpretations of the *Steelworkers Trilogy* and *AT&T*. In *Morristown Daily Records v. Graphic Communications Union, Local 8N*, 832 F.2d 31 (3d Cir. 1987), the Third Circuit found that the district court had referred the threshold issue of arbitrability to the arbitrator. Reversing the district court, the Third Circuit candidly recognized that the governing principles are sometimes difficult to apply, but sought no license to disregard *AT&T*, finding that:

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[1] The *AT&T* Court reasserted that labor arbitration is an important means of peacefully resolving industrial disputes, but it did not refer to the language that the *Steelworkers Trilogy* had used to describe the presumption of arbitrability.

> The message is clear that courts must carefully analyze the contractual language to determine whether a particular dispute is arbitrable. Although answering that question may entail some probing of preliminary substantive issues, that requirement will not relieve courts of the duty to decide arbitrability. [*Id.* at 33-34.]

The *Morristown* court also noted that the Third Circuit had already rejected the proposition that the form or phrasing of a grievance is dispositive. Rather, in the Third Circuit's view, a decision on the arbitrability of a particular dispute requires at least some consideration of the substance of the grievance. As that court stated, "we must first isolate the nature of the dispute." *Id.* at 34, citing *Radio Corporation of America v. Association of Scientists & Professional Engineering Personnel*, 414 F.2d 893, 895 (3d Cir. 1969).

The Eleventh Circuit expressed a similar view in *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 327 F.2d 709 (11th Cir. 1987). Recognizing that the lower courts' role in cases brought to compel arbitration remains limited, and often requires the lower courts only to decide whether the claim is "on its face governed by the contract," *American Manufacturing Co.*, 363 U.S. at 568, the Eleventh Circuit nevertheless struck the appropriate balance:

> The parties' broad arbitration clause is not limitless. The presumption favoring arbitration, *AT&T Technologies*, 106 S. Ct. at 1419, cannot swallow the underlying foundation for arbitration: the dispute to be arbitrated must involve construction of the substantive provisions of the contract. [*Id.* at 714.]

The court further observed:

> The union attempts to sidestep the requirement that the dispute concerns an obligation created by the contract by asserting that there is no dispute concerning the union's acceptance. We conclude other-

> wise. . . . [T]he collective bargaining agreement creates no obligations concerning acceptance. There simply is no dispute as to the construction of a clause of the contract with regard to acceptance because no such clause exists. [*Id.*]

The Ninth Circuit's departure from the prior interpretations of the *Steelworkers Trilogy*, in the Third and Eleventh Circuits, seriously threatens the uniformity of the modern law of labor arbitration. Given a standard arbitration clause, the Ninth Circuit's decision compels arbitration whenever the grieving party frames its grievance as a substantive violation of an "implied covenant" of a collective bargaining agreement. By contrast, the Third and Eleventh Circuits remain unwilling to rely entirely on the wording of a grievance. The latter require at least some factual foundation for the grievant's claim that the collective bargaining agreement grants the substantive right being asserted. In the instant case, the Third and Eleventh Circuits would have undoubtedly found it significant that no express provision of the parties' agreement grants the substantive right that the union asserts. In all likelihood, they would have required at least a preliminary inquiry into the parties' bargaining history, or their past practice.

AGC respectfully submits that this Court must review the Ninth Circuit's decision, in order to resolve the conflict between that decision and the decisions of both this Court and other circuits. If left undisturbed, the Ninth Circuit's decision will deprive both labor and management of the uniform application of our federal labor law.

II. The Ninth Circuit's Decision Creates Great Uncertainty Over the Scope of Current Labor Agreements, and Will Complicate the Negotiation of New Agreements.

The union has advanced the open-ended theory that Granite Rock Co. agreed to arbitrate all disputes that might grow out of covenants implied, not by any set

of facts, but by federal common law. This theory is unconstrained by the text of the collective bargaining agreement, the bargaining history of the parties, the past practice of the parties, or even any readily discernible notion of public policy.[2] When the Ninth circuit endorsed this theory, it therefore left both labor and management without any readily discernible means to determine the precise scope of their current collective bargaining agreements. The Ninth Circuit also greatly complicated the negotiations for new agreements. The lower court's decision will not only make the administration of current agreements difficult, but also cause negotiations for new agreements to dwell on issues long thought settled. If allowed to stand, the Ninth Circuit's decision will compel labor and management to revise their arbitration clauses, or to accept that arbitrators have suddenly acquired the authority to rewrite the substantive terms of their collective bargaining agreements.

With this Court's endorsement, arbitration has become a cornerstone of labor-management relations, and a key to industrial peace. The parties to the collective bargaining process have widely embraced arbitration in reliance upon the principles first enunciated in the *Steelworkers Trilogy*. These principles long appeared to ensure that neither labor nor management would be compelled to arbitrate matters that they had not agreed to arbitrate. In the instant case, the Ninth Circuit blinded itself to all but the form of the union's grievance, and reached a re-

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[2] The 100th Congress recently rejected a proposal to amend the National Labor Relations Act (hereinafter "NLRA") to forbid individuals from investing in both union and open shop construction companies. See H.R. 281, 100th Cong., 2d Sess. (1988) and S. 492, 100th Cong., 2d Sess. (1988). Whether Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4), actually forbids covenants to avoid these investments is currently pending before the National Labor Relations Board in *Painters and Allied Trades District Council No. 51 and Manganaro Corp., et al.* Cases 5-CC-1036, 5-CB-4687, 5-CC-1033 and 5-CB-4689.

sult that the parties clearly did not contemplate. The Ninth Circuit has therefore undermined the longstanding principles that have encouraged standard arbitration clauses. If left standing, the decision will require the parties to specify in great detail any matter which they wish to exclude from arbitration. At a minimum, the decision will greatly prolong negotiations. Many parties may withdraw their commitment to arbitration completely, choosing instead to rely on judicial intervention or simple self-selp. This would, of course, have the tendency to destabilize labor-management relations by increasing the likelihood of future labor disputes. The great irony is that the Ninth Circuit's expansive decision could primarily serve to undermine longstanding commitments to labor arbitration, as the preferred method of resolving industrial disputes.

The Ninth Circuit's decision will also have a significant impact on the administration of current labor agreements. The facts of the instant case are illustrative. Here, simply because the parties' collective bargaining agreement contains a standard arbitration clause (limiting arbitration to disputes "arising under the contract"), the union has succeeded in compelling the arbitration of an issue that the parties never discussed. Granite Rock had no way to know that the arbitration clause that it signed would be construed to reach the union's grievance. In arriving at its decision, the lower court undertook no preliminary analysis to determine the parties' intent. Instead, it relied on the union's wholly unsupported assertion that Granite Rock had made an "implied covenant" to sharply limit, if not completely avoid, any investment in an open shop company that would compete with other signatories to the same collective bargaining agreement.

If left undisturbed, the decision below will cast great doubt on the scope of current collective bargaining agreements, and complicate the negotiation of new agreements.

The need for stable labor-management relations is sufficient, in itself, to justify this Court's review of that decision.

CONCLUSION

For the foregoing reasons, AGC respectfully requests this Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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